

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

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DEC 19 1991

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Review of the Policy Implications) MM Docket No. 91-221,
of the Changing Video Marketplace)

To: The Commission

**REPLY COMMENTS
OF THE
PROGRAM PRODUCERS AND DISTRIBUTORS COMMITTEE**

The Program Producers and Distributors Committee ("PPDC"), ^{1/} hereby submits the following Reply Comments in the above-captioned proceeding for the limited purpose of briefly responding to that portion of the Comments of CBS Inc. which addresses the Prime Time Access Rule ("PTAR"). ^{2/} PPDC strongly opposes CBS' recommendation that the Commission repeal the "off-network" provision of PTAR. This ill-conceived suggestion, which would seriously undermine the Commission's goals in adopting PTAR, is beyond the intended scope of this proceeding.

PTAR is unrelated to the policy matters under examination in this proceeding. While the scope of the proceeding is broad, it is basically intended to elicit responses to the findings and recommendations in the so-called

^{1/} PPDC's members are producers and/or distributors of syndicated television programs. PPDC participated in all stages of the Commission's recent proceeding regarding the Financial Interest and Syndication Rules.

^{2/} Comments of CBS Inc. at 56-76 (filed November 21, 1991)

"Pepper Paper." ^{3/} Significantly, the Pepper Paper is devoid of any mention of PTAR. Rather, the Pepper Paper focuses on the impact of the Commission's ownership rules on the ability of broadcast television to compete against cable and other emerging video services. If the Commission desires to address these important issues in a meaningful fashion, it should avoid the consideration of extraneous issues such as PTAR which can serve only to complicate and polarize this proceeding.

PTAR limits network affiliates in the top 50 markets to airing no more than three hours of network or off-network programs during the four designated hours of prime time viewing. 47 C.F.R. §73.658(k). Now that the networks are permitted to obtain certain financial interests in off-network syndication, CBS requests the Commission to allow off-network programs to run during the "access period," which is currently used by stations subject to PTAR for local or first-run syndicated programs.

Eliminating the off-network provision would seriously undermine the goals of PTAR, to the detriment of the television viewing public. PTAR was intended to insure that at least a small portion of the critical prime time evening hours on network-affiliated stations would be devoted to something other than programs which are or have been on a national network. Absent the off-network provision, many

^{3/} Office of Plans and Policy Working Paper # 26. Broadcast Television in a Multichannel Marketplace, DA 91-817, 6 FCC Rcd 3996 (1991).

syndicated first-run programs would likely be pushed out of the way to make room for more network-originated fare, in the form of off-network programs. Networks would then effectively control, directly or indirectly, the entire prime time schedule of their affiliates, in direct conflict with long-standing, and recently reaffirmed, Commission policy.

In the recent "FinSyn" Report and Order, the Commission reiterated its "overall objective of fostering first-run programming as a diverse and competitive alternative to programming that is distributed or has been distributed through the network system." Evaluation of the Syndication and Financial Interest Rules, 6 FCC Rcd 3094, 3146 (1991).

There, as here, the networks urged the Commission to eliminate rules intended to promote and maintain first-run syndication. Nevertheless, the Commission wisely retained its prohibition on network participation in first-run syndication, emphasizing again that

first-run syndicated programming is the only nationally distributed broadcast television programming that competes directly with network and off-network syndicated programming and thus plays a critical role in providing a diversity of program services to the American broadcast audience.

Id. at 3142.

Indeed, as a result of the FinSyn decision, the vitality of truly independent sources of nationally produced programming as alternatives to network and off-network programs is more important than ever. The networks are now permitted to obtain a financial interest in network-exhibited

programs produced by others, including an interest in future syndication rights. In some instances, the networks are now even permitted to participate directly in the business of off-network syndication. They now have a greater interest and ability to shape and participate in the development and sale of programming via off-network syndication. Preserving and promoting first-run syndication as the only alternative source of nationally produced programs is, therefore, more critical now than it was under the original financial interest rules.

Repealing the off-network provision of PTAR, as CBS urges, would be likely to substantially impair the ability of first-run programming to compete as a viable alternative to network and off-network programming. CBS itself believes that there is likely to be some "redistribution" of off-network and first-run programming "between access scheduling and scheduling in other dayparts." CBS Comments at 73. This will occur, according to CBS, because off-network programming has an established track record and is "often the syndicated fare most compatible with the network programming schedule for the same evening." Id. at 58.

CBS contends that if first-run programs are pushed out of prime time, the "overall composition of the menu of choices available to viewers is unlikely to change significantly." Id. at 73. However, for most television homes, the principal viewing period is prime time, when the level of homes using television (HUT) is highest. Thus, for the vast majority of viewers, the elimination of first-run programming during prime

time would in fact have a significant impact on their "menu of choices." Furthermore, access to at least a small portion of the prime time audience is essential to the continued health of the first-run industry overall. Without access to the prime time audience, the ability of first-run producers to create product for other dayparts would, as a matter of financial reality, be seriously undermined.^{4/}

Finally, CBS offers a not-so-subtle argument that the content of first-run programs is somehow less worthy than that of off-network programs. This is exactly the type of content analysis that the Commission (usually with CBS' vigorous support) has in the past so often rejected as contrary to basic First Amendment principles. Rather, the Commission has developed rules, such as PTAR, that promote the diversity of program sources, without basing regulatory decisions on the type or quality of programs from any particular source. The Commission should maintain that approach, and avoid the inherently subjective and unconstitutional task of deciding which types of programs are "best" for the public.

CBS' critique of access programming also paints an overly broad picture of access programs as consisting solely of game shows and reality programs. CBS fails to note that over 20% of the access periods in the top 25 markets are filled with local news and public affairs programs designed to

^{4/} See Network Television Broadcasting, 23 FCC2d 382, 394 (1970) ("[prime time programming] is the key to a healthy syndication industry....").

meet the specific needs of each station's local community. ^{5/}

The networks now control the bulk of prime time and are able to offer practically seamless program schedules. To the extent a particular network program becomes popular, it may be due to many factors, ranging from scheduling and longevity of commitment to pure luck. It is not because network programs are inherently of greater "quality" than first-run syndicated programs.

What is clear and within the cognizance of the Commission, however, is that a healthy and viable first-run program syndication industry is an essential component of a competitive and diverse free over-the-air television service available to the American public at large.

CONCLUSION

The Commission should reject CBS' call for repeal of the off-network provision of PTAR as it would seriously undermine first-run syndicated programming, which "plays a critical role in providing a diversity of program services to

^{5/} Nielson and Arbitron Metered Market Reports, Monday through Saturday, week of Sept. 23, 1991. (Pittsburgh, Baltimore, Orlando and San Diego based on May 1991 ratings period.)

the American broadcast audience." 6 FCC Rcd at 3142.
Consideration of CBS' request would also unnecessarily add a
highly contentious and unrelated issue to this proceeding.

Respectfully submitted,

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December 19, 1991

CERTIFICATE OF SERVICE

I, Jane Nauman, hereby certify that a copy of the foregoing "Reply Comments of the Program Producers and Distributors Committee" was served this 19th day of December, 1991, by first-class mail, postage-prepaid, to the following individual at the address listed below.

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